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Before the Federal Communications Commission Washington, DC 20554

AUG 2 8 2002

In the Matter of)		
Amendment of Section 73.202(b))		FEDERAL COMMUNICATIONS COMMISSION OFFICE OF THE SECRETARY
Table of Allotments)	MB Docket No. 02-136	
FM Broadcast Stations)	RM-10458	
(Arlington, The Dalles, and Moro, Oregon,)		
and Covington and Trout Lake, Washington))		
•			

To: Assistant Chief, Audio Division Media Bureau

OPPOSITION TO MOTION

Mid-Columbia Broadcasting, Inc. ("Mid-Columbia"), First Broadcasting Company, L.P. ("FBC"), and Saga Broadcasting Corp. ("Saga") (together, "Joint Parties"), hereby oppose the "Motion to Sever" filed by Triple Bogey, LLC, MCC Radio, LLC and KDUX Acquisition, LLC (together, "KDUX"). In the Motion to Sever, the KDUX parties request that the Commission reject the Joint Parties' amended proposal and consider it only after final resolution of their counterproposal in this proceeding. As shown below, the Joint Parties' amended proposal is properly within the scope of this proceeding. However, if the Commission decides instead that the Joint Parties' counterproposal should be considered as a new petition, as such it was timely filed and mutually exclusive with respect to the other counterproposals in this proceeding and must be considered and resolved in this proceeding under long-standing rules of procedure. There simply is no support in any of the Commission's cases for KDUX's theory that

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The Commission permits a party 10 days in which to file an opposition to a motion. 47 C.F.R. § 1.45(b). The Motion to Sever was filed on August 13, 2002, thus the date for oppositions is August 28, 2002. See 47 C.F.R. § 1.4.

In a similar vein, although not formally a motion, Mercer Island School District and Peninsula School District No. 401 request in reply comments (at page 2) that the Commission treat the Joint Parties' amended proposal "as a new petition for rule making

consideration of the Amended Proposal should be held in abeyance to await a determination in this proceeding.

I. The Joint Parties' Amended Proposal is Properly Within the Scope of This Proceeding.

- 1. Two of the Joint Parties, Mid-Columbia and FBC, filed the petition for rule making that initiated this proceeding. That petition requested, *inter alia*, the relocation of Mid-Columbia's station KMCQ from The Dalles, Oregon on Channel 283C to Covington, Washington on Channel 283C3. At the comment deadline, Mid-Columbia and FBC, now joined by Saga, amended their initial proposal to change the community of license of KMCQ to Kent, Washington on Channel 283C2 (the "Amended Proposal"). KDUX argues that this amendment should not be permitted, citing the Commission's recent decision in *Taccoa*, *Sugar Hill*, *and Lawrenceville*, *Georgia*, 16 FCC Rcd 21191 (2001). This argument fails for several reasons.
- 2. First, the Commission's *Taccoa*, *Georgia* policy is satisfied here. Saga is willing to install a directional antenna or reduce power to protect the Canadian allotment with which KAFE is short-spaced on Channel 281C. However, Saga would prefer not to make such modifications, so Saga's willingness to participate in this proceeding was based on its ability to obtain a level of confidence that Industry Canada would accept a proposed arrangement of Canadian allotments that would allow KAFE to operate without limiting power or using a directional antenna. Saga could not obtain that level of confidence at the time the initial petition for rule making was filed. FBC and Saga negotiated with all reasonable diligence in an attempt to obtain Saga's consent, but were unable to reach agreement. In FBC's view, the negotiations were at an end, and thus

and either dismiss it or conduct a notice and comment rule making proceeding." As discussed herein, such a request for dismissal has no basis in law and should be denied.

In *Taccoa*, *Georgia*, the Commission announced that it would "carefully review future counterproposals filed by the original rulemaking proponent," and it reserved the right to

the initial petition for rule making could not have included Saga's consent. As a result, FBC was forced to file its initial proposal without the benefit of the KAFE channel change.

- 3. However, because of recent regulatory changes undertaken by Industry Canada, that situation has changed. Saga has agreed to the KAFE channel change, thereby enabling FBC to file the Amended Proposal. Attached are declarations of Stephen B. Acker, a Canadian lawyer, and Gordon Elder, a Canadian engineering consultant, describing (i) recent regulatory revisions undertaken by Industry Canada, and (ii) a significant change in Industry Canada's flexibility and willingness to accept innovative engineering solutions. According to Mr. Acker, there has been a change in Industry Canada's openness to innovative engineering solutions that has become apparent within the last year. Further, according to Mr. Elder, Industry Canada recently has relaxed its domestic spacing rules, which facilitated the development by Mr. Elder of a proposal to revise the Canadian FM table of allotments to accommodate the KAFE channel change. During the initial negotiations leading up to the filing of the rule making proposal, Mr. Elder advised FBC that Industry Canada would be unlikely to accept the necessary changes to accommodate the KAFE channel change. Only when a subsequent change in openness within Industry Canada enabled Mr. Elder to render an opinion regarding the KAFE channel change did the Amended Proposal become a possibility.⁴
- 4. Second, having found the necessary confidence level that its Canadian proposals would find acceptance, Saga had the undeniable right to file a counterproposal in this proceeding. Saga did not contribute to the initial petition for rule making. Saga's contribution to the Amended Proposal a modification to its station KAFE, Bellingham, Washington permits

process in a new proceeding any such counterproposal filed without an explanation why it could not have been advanced initially.

The Joint Parties accompanied their Amended Proposal with the explanation referred to herein, and it was thus complete at the time of filing.

an arrangement of allotments with significantly enhanced public interest benefits over those offered by Mid-Columbia and FBC alone. Saga could have styled the pleading "Counterproposal of Saga Broadcasting Corp.," and submitted it with the necessary consent statements of the other parties. It can hardly be denied that the pleading, thus styled, would be permissible. Yet to concede that point while denying the legitimacy of the same pleading styled as "Amended Proposal" would be to foolishly elevate form over substance. Moreover, it would effectively deny Saga the right to participate in this proceeding. Saga, Mid-Columbia and FBC are different parties than Mid-Columbia and FBC, and together they can offer what they cannot accomplish individually.

II. Even if the Commission Treats the Amended Proposal as an Initial Petition for Rule Making, it was Timely and Conflicting and Must be Resolved in This Proceeding.

5. It has long been the Commission's policy to treat any mutually exclusive request for allotment changes filed before the comment date in a proceeding, whether filed as a petition for rule making or an application, as a counterproposal entitled to comparison with the proposals to which it conflicts. See Pinewood, South Carolina, 5 FCC Rcd 7609 (1990) (parties contemplating the filing of a petition for rule making that may conflict with an alternate channel must do so by the comment date in order to have their proposal considered as part of the proceeding); Amendment of the Commission's Rules to Permit FM Channel and Class Modifications by Application, 8 FCC Rcd 4735 (1993) (a mutually exclusive application filed prior to counterproposal deadline will be treated as a counterproposal in the proceeding). In this case, the Amended Proposal conflicts with the counterproposals filed by KDUX, New Northwest Broadcasters, LLC, and Two Hearts Communications, LLC. That was not the situation in Taccoa, Georgia. There, the petitioner's counterproposal was in conflict only with its own petition. Accordingly, under applicable policies, even assuming that Taccoa, Georgia demands

that the Amended Proposal be treated as a new initial proposal, it must be compared against the counterproposals with which it conflicts and to which it is timely filed.

WHEREFORE, for the foregoing reasons, the Commission should deny the motion of KDUX to sever and hold in abeyance the Joint Parties' amended proposal in this proceeding.

Respectfully submitted,

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August 28, 2002



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August 27, 2002

John Karousos Assistant Chief, Audio Division Media Bureau Federal Communications Commission 445 12th Street SW Washington, DC 20554 U.S.A.

Dear Sir:

Re: Canadian Treatment of International Co-ordination Issues Under the 1991 Canada/U.S. Agreement Related to the FM Broadcasting Service MB Docket No. 02-136, RM-10458

I am a partner in the law firm Johnston & Buchan LLP based in Ottawa, Canada. Johnston & Buchan LLP is one of Canada's foremost law firms with expertise in communications law including broadcasting, telecommunications and spectrum related issues. I myself have specialized in radio licensing and spectrum allocation issues for over 10 years and, on behalf of clients, I have dealt regularly with Industry Canada officials on a range of radio regulatory issues. Prior to practising communications law, I worked for 17 years in the federal government including three years in the former Department of Communications, now part of Industry Canada.

It has been my experience over the last year that the evaluation by Industry Canada of requests for co-ordination under the 1991 Canada/U.S. FM Agreement has undergone a gradual but significant change. In my opinion, Industry Canada has shown increased flexibility and more willingness to accept imaginative engineering solutions in order to permit requested parameter changes to FM radio stations and allotments in the U.S. Such flexibility is of course conditional on these solutions creating no prejudice to Canadian FM stations or allotments. In adopting this approach, Industry Canada officials have in no way compromised their primary duty of protecting the Canadian broadcasting system and Canadian rights and privileges under the 1991 Canada/U.S. FM Agreement. Rather, they have, in my view, come to recognize that increased openness to solutions such as changes to the Canadian allotment plan can at the same time enhance Canada/U.S. relations in the broadcasting arena, as well as promote the public interest in Canada.

For example, as a result of the changes in the regulatory climate at Industry Canada which I have discussed above, Industry Canada is much more likely today to be amenable to the changes to the Canadian FM allotment plan necessary to accommodate First Broadcasting's move of KMCQ-FM north from northern Oregon to Kent, Washington. The necessary changes to the Canadian FM allotment plan are fully described in the July 29, 2002 letter from Gordon Elder, of Elder Engineering, Inc., to Paul Vaccani, Director of Broadcast Applications Engineering in the Spectrum Management Division of Industry Canada. A copy of this letter was included in First Broadcasting's Comments and Amended Proposal, filed with the Federal Communications Commission on July 29, 2002 in MB Docket No. 02-136, RM-10458.

I trust this letter will prove useful in your deliberations.

Yours sincerely,

Stephen B. Acker

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August 28, 2002

John Karousos Assistant Chief, Audio Division Media Bureau Federal Communications Commission 445 12th Street, SW Washington, DC 20554 USA

Dear Mr. Karousos:

Subject: MB Docket No. 02-136, R-10458

I established Elder Engineering Inc. in 1961, to provide consulting services, mainly for Canadian AM, FM and television broadcast applicants and licensees. Our typical work includes a frequency search, antenna design, site selection, feasibility study, system design, technical brief, equipment selection, procurement or field tests and measurements.

We assisted First Broadcasting to develop a plan to accommodate the northward move of KMCQ-FM from northern Oregon to Kent, Washington, which requires a channel change for KAFE-FM, Bellingham, WA, from 282C to 281C. The KAFE-FM channel change requires several changes to the Canadian FM table of allotments, which changes are described in Exhibit 3 to the Comments and Amended Proposal filed by First Broadcasting, Mid-Columbia Broadcasting, and SAGA Broadcasting on July 29, 2002 in the above-reference docket. Elder Engineering assisted First Broadcasting by developing a proposal, which was submitted to Industry Canada, to accommodate the KAFE-FM channel change by modifying Canada's FM table of allotments or plan.

We also assisted First Broadcasting to analyze the possibility of accomplishing the KAFE-FM channel change when SAGA Broadcasting and First Broadcasting initiated their negotiations over the possibility of SAGE Broadcasting changing KAFE-FM's channel to accommodate moving KMCQ-FM northward. At that time, we advised First Broadcasting that Industry Canada was unlikely to be amenable to the changes to the Canadian FM table of allotments necessary to enable KAFE-FM to change its assigned channel.

Subsequently, Industry Canada undertook a detailed programme for the evaluation of minimum distances between Canadian FM allotments and assignments as set forth in its Broadcast Application Procedures and Rules, Part III. The third and fourth adjacent channel spacing rules were revised last month and the second adjacent channel spacing rules were revised on August 17. These revised rules are in effect and in use for the evaluation of FM applications.

These revisions have relaxed Industry Canada's domestic FM protection rules and influenced Industry Canada's FM applications engineering staff. The new channel spacing rules facilitated our development of a plan on behalf of First Broadcasting to modify the Canadian table of FM allotments to accommodate the international coordination required by the KAFE-FM channel change. In addition, consistent with Industry Canada's relaxation of FM spacing rules, their staff have become less strict and more flexible in their review of international coordination requests. We expect that this will benefit First Broadcasting's proposal concerning the KAFE-FM, Bellingham, WA amendment.

Yours very truly,

0828lk

cc: Phil Marchesiello

Gordon Elder, P. Eng.

Jardon Elder

CERTIFICATE OF SERVICE

I, Lisa M. Balzer, a secretary in the law firm of Shook, Hardy and Bacon, do hereby certify that I have on this 28th day of August, 2002 caused to be mailed by first class mail, postage prepaid, copies of the foregoing "OPPOSITION TO MOTION" to the following:

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